

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF TRANSPORTATION

In the Matter of the Application of
Maiers Transport and Warehousing,
Inc. for a Horizontal Clearance
Variance

FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION

The above-entitled matter came on for hearing before Richard C. Luis, Administrative Law Judge, on November 14, 1997, in Minneapolis, Minnesota. The record closed on November 25, 1997.

Appearing on behalf of Maiers Transport and Warehousing, Inc., the Applicant herein, was John L. Maiers, President and Mike Mueller, Vice President of Maiers Transport and Warehouse, 515 25th Avenue North, St. Cloud, Minnesota 56302.

Appearing on behalf of the United Transportation Union (UTU) was John P. Smullen, Minnesota State Legislative Director, 3989 Central Avenue N.E., Suite 525, Columbia Heights, Minnesota 55421-3900.

Appearing on behalf of the staff of the Department of Transportation was Ronald F. Mattson, Mn/DOT Office of Railroads & Waterways, 395 John Ireland Boulevard, Mail Stop 440, St. Paul, Minnesota 55155.

Karl Knutsen, BMW Minnesota State Legislative Director, 2612 West River Parkway, Minneapolis, Minnesota, 55406, submitted a memorandum on behalf of the Brotherhood of Maintenance of Way Employees (BMW) objecting to this proceeding as being preempted by federal law.

NOTICE

Notice is hereby given that, pursuant to Minn. Stat. § 14.61 and the Rules of the Office of Administrative Hearings and the Transportation Regulation Board applicable to the Department of Transportation, exceptions to this Report, if any, by any party adversely affected must be filed within 20 days of the mailing date hereof with James N. Denn, Commissioner of Transportation, 395 John Ireland Boulevard, St. Paul, Minnesota 55155. Exceptions must be specific and stated and numbered separately. Proposed Findings of Fact, Conclusions and Order should be included, and copies thereof shall be served upon all parties. If desired, a reply to exceptions may be filed and served within ten days after the service of the exceptions to which reply is made. Oral argument before the Commissioner may be permitted to all parties adversely

affected by the Administrative Law Judge's recommendation who request such argument. Such request must accompany the filed exceptions or reply.

The Commissioner of Transportation will make the final determination of the matter after the expiration of the period for filing exceptions as set forth above, or after oral argument, if such is requested and had in the matter. Further notice is hereby given that the Commissioner may exercise his discretion to accept or reject the Administrative Law Judge's recommendation and that said recommendation has no legal effect unless expressly adopted by the Commissioner as his final order.

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STATEMENT OF ISSUES

1. Is Minn. Stat. § 219.46 preempted by the Interstate Commerce Commission Termination Act, P.L. 104-88, 49 U.S.C. 101, *et. seq.* (ICCTA)? If so, what effect does that preemption have on this matter?

2. Has the Applicant demonstrated the statutory requisites for a variance from the horizontal clearance requirements of Minn. Stat. § 219.46?

Based upon all of the testimony and exhibits herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Maier's Transport and Warehousing, Inc. (MTW) is a truckload motor common carrier, moving industrial freight by dry freight vans. A substantial portion of MTW's business is transporting paper on large rolls, up to 8,000 pounds in weight per roll, delivered to its warehouses by rail car.

2. Due to expansion of its business, MTW is seeking to expand into an additional 270,000 square feet of warehouse space. The warehouse being sought is part of the Fingerhut distribution center (Fingerhut East). MTW intends to arrange with the Burlington Northern Santa Fe railroad (BNSF) to have approximately 1,200 feet of trackage run alongside the east side of two buildings of Fingerhut East, Buildings 8B and 9, extending past the buildings for about 250 feet to a bump post. Maier's Exhibit 6. Each building has loading docks (four on Building 8B and six on Building 9) for moving goods from the rail cars into the warehouses. Each loading dock is slightly larger in width than the door to a rail car.

3. Unloading train cars, (known as "the breakout") is complicated by the distance between the edge of the loading dock and the door of the rail car. That distance is bridged by a dock plate large enough and sturdy enough to hold a lift truck and its load. In this proceeding, MTW sought a variance allowing a clearance of six feet six inches from the track centerline to allow removing the first bundles of paper in the

breakout without using a dock plate. Shortening the distance will also reduce the amount of sway experienced when lift trucks traverse the dock plate as paper rolls are being removed from further in the rail car.

4. Fingerhut East is comprised of a number of buildings with BNSF tracks running along right of way between the buildings. The buildings to the east of the existing rail lines are being used by Fingerhut. Those buildings are being served by BNSF. A gate blocks the tracks at the southern end of the Fingerhut East complex. MTW has obtained Buildings 8A, 8B, and 9, which are all of the buildings on the west side of the rail right-of-way. There is a fifty foot gap between Buildings 8B and 9 that is connected by a corridor inset approximately 15 feet from the east wall of Buildings 8B and 9. Maier Exhibit 6. The new track is intended to run off of the existing track along the eastern side of Buildings 8A and 8B. The new track will be running parallel to the spur track that formerly existed there, but would be closer to Buildings 8B and 9.

5. Buildings 8B and 9 have various fixtures protruding from their east walls. A flue stack is located on Building 8B that extends about 18 inches out from the east wall starting at approximately 12 feet above the ground. Exhibit 6. A similar flue stack is on Building 9, starting at approximately 14 feet above the ground. Exhibit 4. Several drain pipes extend from the roof of Buildings 8B and 9 to the ground. The pipes extend approximately four inches out from the east walls of the two buildings. *Id.* In Building 9, spouts providing drainage from the sprinkler system extend out approximately five inches. These spouts are approximately six feet above the ground. Electrical conduit on the exterior wall that had distributed power between the buildings in Fingerhut East is being removed due to obsolescence.

6. Applicant discussed this matter with the UTU before the hearing, and representatives of both subsequently inspected the location of the proposed variance. UTU members would be switching and spotting the cars brought into this facility. The UTU is opposed to granting the variance to allow clearance as close as 6 feet 6 inches from the center of the track. The requested clearance would allow approximately 18 inches of clearance between the side of a rail car and the east walls of Buildings 8B and 9. The rail crews locating rail cars must be able to see the relative position of each loading dock and the door of the rail car. After a car is properly located across from a loading dock, a member of the rail crew must be on the building side of the rail car to uncouple that car. The UTU indicated that a clearance of seven feet six inches would provide sufficient clearance to perform these tasks without undue risk of harm.

7. The UTU expressed three concerns with respect to any variance to be granted. They are (1) that standard "no clearance" signs be erected; (2) that the signs and the area of the close clearance be sufficiently illuminated during darkness; and, (3) that a smooth and even surface be provided on the east side of the buildings. Applicant has agreed to all three of these conditions, and will take such steps as are necessary to accomplish them.

8. The most appropriate configuration and location of "no clearance" signs is the standard vertical sign provided in Minn. Rule pt. 8830.9930 (Exhibit 7), to be located 1) on the southeast corner of Building 8A; 2) just north of the switching point (mounted away from the wall but no nearer than 8 feet six inches from the center of the trackage

at that point) so that it is clearly visible to train crews proceeding northerly toward Buildings 8B and 9; 3) on the northeastern corner of Building 8B (facing north); 4) on the southeast corner of Building 9 (facing south); and 5) on the northeast corner of Building 9. There is currently adequate electric lighting illuminating the east side of the buildings. To ensure the signage will be visible, it is appropriate that each "no clearance" sign be illuminated and that each light for the signs be controlled by a timer, photo cell, or similar automatic device which would assure that the sign and close clearance area be illuminated during hours of darkness.

9. On October 8, 1997, a request for a variance was submitted to the Department, along with the appropriate fees and other documentation. On October 10, 1997, the Department issued a Notice of Hearing, setting the hearing in this matter for November 14, 1997. On October 13, 1997, the Notice of Hearing was served upon the Applicant, the landowner, the railroad, and railroad unions. On November 25, 1997, MTW, the UTU, and BNSF agreed that the clearance request should be amended to a clearance of seven feet six inches from the centerline of the track.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Interstate Commerce Commission Termination Act does not preempt Minn. Stat. § 297.46 as to the imposition of safety standards for the siting of trackage.

2. The Department of Transportation has jurisdiction over the subject matter of the hearing.

3. The Department gave proper notice of the hearing and has fulfilled all procedural requirements of law or rule so that the matter is properly before the Administrative Law Judge.

4. Any of the foregoing Findings of Fact considered more properly as Conclusions are hereby adopted as such.

5. The initially proposed location of trackage would place it within the statutory horizontal clearance area by twenty-four inches.

6. The encroachment initially proposed will create a condition unduly hazardous to employees of the Applicant or the BNSF railroad.

7. The subsequently proposed encroachment will place trackage twelve inches within the statutory horizontal clearance area.

8. The modified encroachment will not create a condition unduly hazardous to employees of the Applicant or the Railroad, so long as the "no clearance" signage referred to in the Findings is posted and properly illuminated and all protruberances within the horizontal clearance area are removed.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED: That the Commissioner grant a variance to Maier's Transport and Warehousing, Inc. from the horizontal clearance requirements of Minn. Stat. § 219.46 for Buildings 8B and 9, to a minimum clearance of 7 feet, six inches, on the condition that the Applicant maintain vertical "no clearance" signs on the easterly corners of Building 8A, 8B, and 9, that the signs and the close clearance area be illuminated during hours of darkness, that all protruberances located on the east walls of Buildings 8B and 9 be removed, and that after the signage, lighting, and building modifications are completed, there be an inspection by the Department to verify compliance with these requirements.

Dated this _____ day of December 1997.

RICHARD C. LUIS
Administrative Law Judge

Reported: Tape Recorded, no transcript prepared.

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

The horizontal clearance mandated by Minn. Stat. § 297.46, subd. 1d(1), is eight feet, six inches from the center line of track. The vertical extent to which the horizontal clearance area applies is 22 feet. Minn. Stat. § 297.46, subd. 1d(3). A variance may be obtained to run track closer to an obstruction, where the applicant can show that maintaining the clearance is:

. . .unreasonable or unnecessary or the erection or construction of the overhead or side obstruction or tracks or the reconstruction and maintenance of them at less clearance than provided in section 219.46 will not create a condition unduly hazardous to the employees of that common carrier, person, or corporation.

Minn. Stat. § 219.47, subd. 1.

In its original request, MTW requested a variance to allow a six feet six inch clearance between track and a loading dock. Subsequent to the hearing, MTW, the UTU representative and a representative of the BNSF met and agreed that the variance request should be changed to seven feet six inches.

Clearance of six feet, six inches from the center of the track would place the edge of each rail car within eighteen inches of the side of Buildings 8B and 9. This clearance was sought to reduce the distance that lift trucks must span in removing rolls of bulk paper between the rail car and the dock. By not requiring the normal (statutory) distance from the center of the track, paper rolls located in the doorway of the rail car can be removed without using a dock plate. This practice reduces the costs to MTW by eliminating damage to the outer edges of paper rolls in the rail car doorway that occurs when the dock plate is put in place. In addition, a shorter distance between the dock and the rail car reduces the risk of injury to the lift truck operator by reducing the distance that must be crossed by the lift truck and reducing the degree of tilt experienced in the rail car when the weight of the lift truck and its load moves between the rail car and the loading dock.

In order to line up the door of the rail car with the loading dock, a rail crew member must be able to view both the rail car door and the loading dock. A six feet, six inch clearance for paper roll breakout has been recommended where rail crews can spot the rail car from a dock that runs parallel to the track. In the Matter of the Application of International Paper, OAH Docket No. 6-3001-10462-2 (Recommendation issued May 10, 1996). No reasonable alternative to situating a rail crew member physically between the rail car and sides of Buildings 8B and 9 for spotting has been offered. In addition, a rail crew member is required to go physically into the area between the rail car and the buildings for uncoupling the cars. The benefits derived in improved safety to warehouse workers and reduced costs to MTW are outweighed by the risk to rail crews and MTW employees when bringing in and removing rail cars on the new spur. Eighteen inches is insufficient room to ensure workers will not be injured by the movement of the cars adjacent to Buildings 8B and 9, since the requirements of spotting and uncoupling the rail cars requires the bodies of those workers to be on the building side of the rail car.

While the statutory standard has not been met for a variance to six feet, six inches, the analysis changes for the agreed upon distance of seven feet, six inches. At that distance, rail crews have thirty inches between themselves and the building walls. That distance is sufficient to avoid exposing workers to undue hazard in the spotting and uncoupling of rail cars on the west side of Fingerhut East. To conform with the variance recommended, MTW will need to remove every obstruction on the east side of Buildings 8B and 9 to a height of 22 feet, at any point along either building where the east wall comes within 8 feet, 6 inches. The record does not show clearly the height of the roof overhang on either Building 8B or Building 9. To the extent that either roof overhang falls below 22 feet, a horizontal clearance should be granted for the roof overhang also, since there is no reasonable risk of harm to workers conducting normal rail operations at this site from that feature.

The BMWF maintains that the statutes governing safety regulation of railroads have been preempted by the recent enactment of the Interstate Commerce Commission Termination Act (49 U.S.C. 101, *et seq.*)(ICCTA), which went into effect on January 1,

1996. Prior to the ICCTA, states (including Minnesota) regulated the establishment, abandonment, removal, and modification of intrastate spur and side tracks, agencies, and most other matters pertaining to operation of railroads not in interstate commerce. The Interstate Commerce Commission regulated economic activity of the railroads in interstate commerce. Congress amended substantial portions of the federal railroad law in 1980 (in the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980) (codified in scattered sections of 49 U.S.C.)). The Staggers Rail Act explicitly acknowledged that intrastate spur abandonments were within the exclusive jurisdiction of states and that the ICC lacked jurisdiction of those matters. That lack of jurisdiction was confirmed in Illinois Commerce Commission v. ICC, 879 F.2d 917 (D.C. Cir. 1989).

As its name suggests, the ICCTA abolished the Interstate Commerce Commission as a body to control the economic functioning of railroads. The ICCTA also created the Surface Transportation Board (STB), which assumed the functions that remained, formerly performed by the ICC. The ICCTA also amended some portions of the Staggers Rail Act of 1980, to decrease regulations imposed on the railroad industry.

The jurisdiction of the STB is set out in section 10501 of the ICCTA. Paragraph (b)(2) of that section identifies the STB's jurisdiction over the abandonment or discontinuance of "spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one state, is exclusive." BWME points out that the section also states as follows:

. . . remedies . . . with respect to the regulation of rail transportation are exclusive and preempt the remedies provided under federal or state law.

BWME Comment (November 13, 1997), at 2.

The ICCTA has eliminated an agency, modified the economic regulation of railroads, and expressly preempted state regulation of intrastate spur rail lines and agencies. At the same time, the U.S. Department of Transportation continues to administer the Federal Railroad Safety Act (49 U.S.C. Chapter 210, *et seq.*)(FRSA). The BMW E asserts that the ICCTA has preempted the FRSA, as well as all state regulation of railroad operations. There is nothing in the record of this matter to indicate that the safety regulations of the FRSA are no longer being enforced.

Cases have been heard on the issue of agency closing in federal (CSX Transportation, Inc. v. Georgia Public Service Commission, 944 F. Supp. 1573 (N.D. Ga. 1996)) and state courts (Burlington Northern Railroad Company v. Page Grain Company, 249 Neb. 821, 545 N.W.2d 749 (Neb. 1996)). Both cases held that the ICCTA preempted any state involvement in a railroad's decision to close an agency. This preemption applied to preclude states from regulation of railroad operations and cited Senate Report No. 176, 104th Cong., 1st Sess. 14 (1995) which states that the Act "should not be construed to authorize states to regulate railroads in areas where federal regulation has been repealed by the bill."

Later in the opinion, the court again addressed the language relating to spur tracks in the following manner:

Perhaps the most significant change to the Staggers Rail Act, which the court has already discussed, is the ICC Termination Act's express removal from the states of jurisdiction over wholly intrastate railroad tracks. The Staggers Rail Act conferred authority on the states to regulate wholly intrastate tracks. See Illinois Commerce Commission, 879 F.2d at 921 (holding that the Staggers Rail Act explicitly excluded from its jurisdiction "spur, industrial, team, switching or side tracks if the tracks are located . . . entirely in one state" and citing former 49 U.S.C. § 10907(b)(1) (1982)). Even after finding that the states had jurisdiction over intrastate tracks under the Staggers Rail Act, the court, in Illinois Commerce Commission, stated that the Staggers Rail Act was among the most pervasive and comprehensive federal regulatory schemes. *Id.* With the extension of exclusive federal jurisdiction over wholly intrastate tracks, one of the few railroad matters previously within the jurisdiction of the states, the ICC Termination Act evinces an intent by Congress to assume complete jurisdiction, to the exclusion of the states, over the regulation of railroad operations. (Citation omitted.)

In the Burlington Northern decision, the Nebraska Supreme Court held

State courts no longer have jurisdiction to consider the practices, routes, services, and facilities of interstate rail carriers because § 10501(a) of the federal ICC Termination Act grants the federal Surface Transportation Board with exclusive jurisdiction over transportation by rail carriers as part of the interstate rail network.

Burlington Northern, 545 N.W.2d at 751.

One case on preemption has been decided (at the administrative level) in Minnesota. In the Matter of the Petitions of Burlington Northern Railroad Company Regarding the Abandonment and Removal of Certain Trackage, OAH Docket No. 6-3001-10635-2 (Dismissal Order entered November 18, 1996), dealt with the issue of preemption when a railroad sought to abandon trackage. In that matter, the BMWF filed objections, alleging that the abandonment and removal of that trackage was not in the public interest and asserting that railroad safety and operations would be impaired. In his Recommended Order, Judge Klein stated:

It is concluded, therefore, that Congress has preempted Minnesota's right to regulate the abandonment and removal of industrial, spur and team trackage. It matters not whether the state's authority is

labeled in terms of "economic regulation" or "safety regulation", because the deregulatory goals of the federal Act would be frustrated if the State were allowed to continue its past regulation under the guise of "safety".

Id.

In this matter, unlike those in CSX or either Burlington Northern matter, the issue is a safety regulation. All of the other cases related to "economic regulation", that is, potentially requiring the railroad to maintain facilities or equipment that it otherwise would remove for business reasons. The regulatory scheme in Minnesota requires for removal of trackage:

A company operating a line of railroad in this state shall not abandon, close for traffic, or remove a spur, industrial, team, switching, or side track which has been used directly by the shipping public for loading or unloading freight without first obtaining the approval of the board. The board shall consider, if submitted, **whether the abandonment, closure, or removal will not substantially reduce the level of safety, health, or welfare** of the railroad's customers, its employees or the public.

Minn. Stat. § 219.681 (emphasis added).

A similar, but more restrictive approach is taken in the consideration of requests to close railroad agencies and stations. The statutes governing such an action require that a hearing be held and set out the following standard:

In the hearing on the abandonment or removal of a shop or terminal, if the board determines that the abandonment or removal will result in efficiency in railroad operation and **will not substantially injure the public or be detrimental to the safety, health, or welfare** of the railroad's customers, its employees, or the public, the petition may be granted; otherwise it must be denied.

Minn. Stat. § 219.71 (emphasis added).

The ICCTA preempts the economic regulation of railroads by the states, whether done as bald economic regulation or under the guise of safety, health, or welfare regulation. This type of safety regulation is expressly mentioned in Section 10101 (8) ("to operate transportation facilities and equipment without detriment to the public health and safety"). The only safety regulations preempted by the ICCTA are those that are economic in nature, such as Minn. Stat. §§ 219.681 and 219.71.

The continued enforcement of the FRSA indicates that its provisions are not considered preempted by the ICCTA. The standards imposed by the FRSA are noticeably different from the economic regulation conducted by the ICC. The standards

in the FRSA are specific safety standards not influenced by economic decisions. Regarding the issue of preemption, the FRSA states:

Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order relating to railroad safety when the law, regulation, or order --

- (1) is necessary to eliminate or reduce an essentially local safety hazard;
- (2) is not incompatible with a law, regulation, or order of the United States Government; and
- (3) does not unreasonably burden interstate commerce.

49 U.S.C. §20106.

Thus, the FRSA explicitly allows more stringent state standards, under certain circumstances. Rail clearance from obstructions is one such state regulation not preempted under the FRSA. Southern Pacific Transp. Co. v. Public Utilities Comm., 647 F.Supp. 1220 (N.D. Cal 1986), *affd.* 820 F.2d 1111 (9th Cir. 1987).

Under the canons of statutory construction, statutes are to be read as consistent with one another, wherever possible. Minn. Stat. § 645.39. Since the ICCTA relates to economic regulation of railroads and the FSRA relates to operational safety considerations, reading the statutes as being consistent with each other requires the conclusion that economic regulation of railroad operation is preempted and safety regulations complying with the standards set out in 49 U.S.C. §20106 are not. While abandonment hearings under Minn. Stat. §§ 219.681 and 219.71 are properly dismissed as preempted by the ICCTA, a hearing on an operational safety requirement (such as sufficient clearance between rail cars and obstructions) is not preempted, since that requirement has no bearing on economic decisions of the railroads and is specifically allowed under the FRSA and the cases decided under that statute.

Based on the record in this matter, the Administrative Law Judge recommends that a variance be granted to allow seven feet, six inches between the center of the trackage to the nearest obstruction, providing that all protruding objects are removed within the variance area, "no clearance" signs are posted and the entire area is kept illuminated.

R.C.L.